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Case No.: 90-1271

# IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1990

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NORFOLK AND WESTERN RAILWAY COMPANY
Petitioner

V.

OLEN ROBERSON, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents

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## RESPONDENT ROBERSON'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Did Congress intend that a railroad worker, engaged in the transportation of coal in or around a coal mine can qualify as a "miner" within the meaning of Section 402(d) of the Black Lung Benefits Act, as amended, 30 U.S.C. 902(d)(1988), and thereby qualify for benefits under the Act?

## LIST OF PARTIES

The names of the parties to the proceeding are contained in the caption.

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## RESPONDENT ROBERSON'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 918 F.2d 1144 and is reprinted in the Appendix to the Brief ("App.") at 1a.

The September 29, 1989 decision of the United States Department of Labor Benefits Review Board, the administrative decision reviewed by the Court of Appeals, reported at 13 BLR (Black Lung Reporter) 1-6.

## JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on November 16, 1990. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1)(1988). The Petition for Writ of Certiorari was filed with this Court on February 11, 1991

in compliance with the time period provided by Supreme Court Rule 13.1.

## STATUTES INVOKED

Black Lung Benefits Act ("BLBA"), Section 402(d), 30 U.S.C. Section 902(d)(1988), as amended by Section 2(b) of the Black Lung Benefits Reform Act of 1977 ("1977 Amendments"), Pub. L. No. 95-239, 92 Stat. 95:

> The term "miner" means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.

## STATEMENT OF THE CASE

### I. Material Proceedings Below

This matter arose on February 24, 1978, upon the filing of a claim for benefits under the Black Lung Benefits Act, as amended, 30 U.S.C. Section 901 et seq. by the Claimant, Olen Roberson, (Director's Exhibit, "DX," 1). The Deputy Commissioner initially approved the claim and named Norfolk & Western Railway (hereinafter referred to as Railroad) as the responsible operator potentially liable for the payment of benefits (DX 11, 17, 20). The Deputy Commissioner later determined that Roberson's activities did not fall within the definition of a miner, and denied benefits. Claimant thereafter requested a formal hearing before the Office of Administrative Law Judges. The hearing was held in Abingdon, Virginia, on July 15, 1985 before Administrative Law Judge, Lawrence E. Gray. The Administrative Law Judge issued a Decision and Order awarding benefits on December 30, 1986. The Railroad timely appealed and filed a Petition for Review and supporting brief with the Benefits Review Board. The

Claimant and Director filed responding briefs. The Benefits Review Board issued a Decision and Order on September 29, 1989 affirming the decision of the Administrative Law Judge. The Railroad then appealed the decision to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals issued an Opinion on November 16, 1990 affirming the Decision and Order of the Benefits Review Board. The Railroad filed its Petition for a Writ of Certiorari with this Court on or about February 11, 1991. The Respondent, Roberson, by Counsel, received the Petition for a Writ of Certiorari on February 19, 1991.

## II. Statement of Facts

At the time of the hearing, Mr. Roberson was a disabled 68 year old man who had completed the ninth grade. Mr. Roberson worked for the N & W Railroad from October 10, 1947 to October 1, 1979. The Administrative Law Judge (hereinafter referred to as ALJ) found that the 14 years of Mr. Roberson's work for the railroad between 1956 and 1973 qualified as the work of a miner (coal transportation worker). The ALJ further concluded that Mr. Roberson had been exposed to coal dust during the period of time he was employed as a coal transportation worker. There is absolutely no doubt that Mr. Roberson suffers from a totally disabling respiratory impairment. The Railroad has abandoned its arguments in regard to Mr. Roberson's eligibility for benefits from a medical standpoint.1

## III. The Court of Appeals Decision

The Court of Appeals for the Fourth Circuit affirmed the Decision of the Benefits Review Board in its entirety. The Court of Appeals ruled that the plain language of BLBA Section 402(d) included railroad workers, such as Mr. Roberson, who were exposed to coal dust while involved in the transportation of coal in or

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1 The Employer does not raise any eligibility issues involving medical questions in the Petition for a Writ of Certiorari.

around a coal mine. App. pg. 5a. The Court of Appeals noted in a footnote that even if the language of the BLBA had been unclear and a resort to the legislative history had been undertaken, the Court's decision would have remained the same. App. pg 7a. The Court of Appeals concluded its opinion by noting that its holding was narrow in scope, applying only in cases of railroad workers exposed to coal dust who were engaged in the transportation of coal or in or around a coal mine who met the tests of function and situs. App. pg. 11a.

## SUMMARY OF THE ARGUMENT REASONS FOR NOT GRANTING THE WRIT

The Railroad advances three major arguments in support of the Petition for a Writ of Certiorari. First, the Railroad argues that since railroad workers already fall within a comprehensive scheme of federal legislation (Federal Employer's Liability Act, 45 U.S.C. Sections 51-60 (1988); the Railroad Retirement Act, 45 U.S.C. Section 231-31u (1988)), the Railroad Unemployment Insurance Act 45 U.S.C. Section 351, et seq. that Congress did not intend to extend the coverage of the BLBA to railroad workers. However, the BLBA is materially different from the Federal Employers liability Act, Railroad Retirement Act and the Railroad Unemployment Insurance Act. Additionally, none of these statutes indicate a Congressional intent to preclude other federal remedial legislation from applying to railroad workers.

Secondly, the Railroad contends that the legislative history in regard to Section 402(d) of BLBA reveals a Congressional intent to exclude railroad workers from the Act's coverage. However, just the contrary is true. The plain language of Section 402(d) reveals that Congress included coal trans-portation workers who worked "in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment."

Finally, the Railroad argues that the Court of Appeal's decision in this case conflicts the United States District Court decision in *Louisville & N.R.R. v. Donovan*,

No. 89-6111-L(G)(W.D. Ky. 1981), rev'd on other grounds, 713 F.2d 1243 (6th Cir. 1983), cert. denied, 466 U.S. 936(1984) (hereinafter referred to as Louisville & N.R.R.). Additionally, the Court of Appeals for the Sixth Circuit reversed the District Court in Louisville & N.R.R. The District Court's reasoning in Louisville & N.R.R. is not in accord with this Court opinion in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

Furthermore, the legislative history upon which the District Court in Louisville & N.R.R. relied, was the Senate Report No. 209 95th Cong., 1st Sess. 21(1977). As the Court of Appeals pointed out the "Senate Bill did not prevail and the subsequent Conference Committee Report contains no language excluding railroad workers or any other specific set of transportation workers from the definition of miner; . . .". App. pg 7a.

## ARGUMENT

I. The Court of Appeal's Ruling That Congress Intended To Include Railroad Workers Within The Scope Of The Black Lung Benefits Act Is Supported By The Plain Language Of The Act And Is Consistent With the Act's Purpose.

First, the Railroad states that there are other Federal programs specifically designated for railroad employees that provide adequate exclusive remedies for railroad employees. One of the Acts the Railroad lists is the Federal Employer's Liability Act, 45 U.S.C. Section 51 et seq. (hereinafter referred to as "FELA"). The FELA essentially is a Federal worker's compensation system for railroad employees. It takes the place of state worker's compensation remedies. The Railroad goes on to argue that FELA is an exclusive remedy and therefore it would be inconsistent to allow railroad employees to make claims under the Federal Black Lung Benefits Act. Yet, the flaw in this argument is clear. A worker that works in an underground coal mine has the protection of state worker's compensation laws just as the railroad employee has the

protection of the FELA. Just as it was necessary for Congress to step in and provide an additional worker's compensation program to underground and surface coal miners for Black Lung (in essence to supplement the state worker's compensation programs until those programs came up to Federal standards in providing protection for occupationally acquired coal worker's pneumoconiosis), Congress stepped in and provided the same additional protection for railroad employees who fall within the working parameters of the coal mining industry.

The Railroad cites case law supporting the argument that occupational disease claims may be made under FELA. However, such claims can only succeed upon a basis of some common law theory of liability, such as negligence. See *Young v. Clinchfield Railroad Company*, 288 F.2d 499 (4th Circuit, 1961). The Railroad also argues that if railroad workers can receive Federal Black Lung benefits, then they would be able to draw both Federal Black Lung and FELA benefits for the same exposure and injury. The Railroad provides no support for this argument. The offset that applies for miners who receive overlapping state and federal benefits would also apply in the case of railroad employees qualifying for both Federal Black Lung benefits and FELA benefits.

The Railroad also discusses the Railroad Retirement Act of 1974, 45 U.S.C. Section 231, et seq. The Railroad argues that to permit a retired railroad worker to collect benefits under the Railroad Retirement Act and the Federal Black Lung Benefits Act allows for double compensation. However, Railroad Retirement Act benefits are received by railroad workers in lieu of Social Security benefits. Certainly, the Railroad must know that many disabled coal miners receive Federal Black Lung benefits along with their Social Security benefits. The Railroad's argument of double compensation has no merit.

Mr. Roberson would agree that Congress has put in place a comprehensive federal statutory scheme providing benefits to railroad employees. However, contrary to the Railroad's contention, Mr. Roberson argues that it is

reasonable to conclude that Congress also intended to provide additional protection to railroad employees exposed to coal dust while engaging in the working parameters of the coal mining industry. Thus, the Federal Black Lung Benefits Act is part of the comprehensive federal statutory scheme that Congress has provided for railroad employees. As the Court of Appeals noted in its opinion, the other federal legislation mentioned by the Railroad does not indicate a Congressional intent to preclude railroad workers from the BLBA. App. pg. 8a. In fact, the FELA specifically states at 45 U.S.C. Section 58:

> Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress.

The second argument advanced by the Railroad revolves around the legislative history of the BLBA, particularly the 1977 Amendments incorporated into the Black Lung Benefits Reform Act of 1977. However, there must be a finding that the statutory language being scrutinized is unclear or ambiguous as to what Congress intended before resorting to an analysis of the legislative history. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (hereinafter referred to as Chevron). The statutory language in question is found in BLBA Section 402(d) which defines the term "miner" as follows:

> Any individual who works or has worked in or around a coal mine or a coal preparation facility in the extraction or prep-aration of coal. Such term also includes an individual who works or has worked in coal mine construction or trans-portation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment. (emphasis added).

The Court of Appeals concluded that the plain language of Section 402(d) included "transportation

workers who were involved in the extraction or preparation of coal, who worked in or around a coal mine and who where exposed to coal dust as a result of such employment." App. pg 5a. The Court of Appeals noted that it was not disputed that Mr. Roberson was exposed to coal dust. The Court of Appeals then addressed the two other requirements in Section 402(d): (1) Situs test (work in or around a coal mine); and (2) function test (work integral to the extraction or preparation of coal). App. pg. 5a.

If one accepts the Railroad's argument that all railroad workers are not included in the term "miner", then one would have to conclude that all coal truck drivers are also not included, which is clearly not the case. Furthermore, one cannot consider the issue of miner without considering also the issue of what is defined as a "mine" since the "miner" definition hinges on a complete and full understanding of the definition of "mine". A coal mine is defined at 20 C.F.R. Section 725.101 the regulations (23):

> "Coal mine" means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon or under or above the surfaces of such land, by any person used in or to be used in or resulting from the work of extracting in such areas of bituminous coal lignite, or anthracite, from its natural deposits in the earth by any means or method and in the work of preparing the coal so extracted and includes custom coal preparation facilities.

There is no doubt that a tipple located at a mine site is included within the definition of mine. There is also no doubt that a preparation facility is considered within the definition of "coal mine". A rail transportation system that connects the tipple and the preparation facility is a

transportation facility falling within the definition of a "coal mine".

The Court of Appeals in concluding that Mr. Roberson satisfied both the situs and function tests noted that Mr. Roberson's work on the railroad was almost exactly the same as the work performed by the truck driver in *Roberts v. Weinberger*, 527 F.2d 600(4th Cir. 1975), hereinafter referred to as *Roberts*. App. pg. 6a. In both the *Roberts* case and this case, a trans-portation worker hauled raw coal from a coal mine site to a preparation facility and was exposed to coal dust as a result of such work. The only difference between the two cases, is that the claimant in Roberts hauled the raw coal by truck as opposed to the use of a train in this case.

Although the Court of Appeals ruled that the language of Section 402(d) was clear and unambiguous as to the Congressional intent, thereby negating a need to resort to the legislature history of the Act, the Court went on to conclude that even if the legislative history is considered the same result is reached. App. pg. 7a. The Court of Appeals found the Railroad's reliance on Senate Report No. 209, 95th Cong., 1st Sess. 21 (1977) to be misplaced. The Senate bill did not prevail and the Conference Report, (H. Conf. Rep. No. 864, 95th Cong. 2d Sess., reprinted in 2 U.S. Code Cong. & Admin. News 308-09 (1978)) "contained no language excluding railroad workers or any other specific set of transportation workers from the definition of miner ..." App. pg. 7a. The Court of Appeals thus concluded that the Director's interpretation of the Act still would be a permissible one and one that must be given effect pursuant to a *Chevron* analysis. App. pg. 7a.

The legislative history is far more confusing than the plain language of the statute. If Congress did not wish to include railroad workers within the definition of miner it could easily have done so. The Court of Appeals' analysis is rational and is in accordance with the law. Thus, the Court should deny the Railroad's Petition for a Writ of Certiorari.

II. The Federal Courts Have Not Issued Conflicting Interpretations Of The Coverage Of Railroad Workers Under The BLBA.

The Railroad has urged the Court to grant its Petition for a Writ of Certiorari on the ground that there are conflicting federal court decisions on whether railroad workers are covered under the Black Lung Benefits Act. However, the Court of Appeals decision in this case is the only current federal court decision on the issue which stands. The only other federal court to address the issue was the Federal District Court for the Western District of Kentucky in the case of *Louisville & N.R.R. v. Donovan*, No. 80-0611-L(G)(W.D. Ky. 1981). However, the Court of Appeals for the Sixth Circuit reversed the District Court decision for lack of subject matter jurisdiction. *Louisville & N.R.R. v. Donovan*, 713 F.2d 1243 (6th Cir. 1983) cert denied, 466 U.S. 936 (1984). The Court of Appeals for the Sixth Circuit in reversing the District Court in *Louisville & N.R.R.* specifically questioned the District Court's interpretation of the legislative history of the 1977 amendments *Louisville & N.R.R., supra*. 713 F.2d at 1247-49. However, the Court of Appeals for the Sixth Circuit concluded that this issue was not properly before the Court and thus could not be resolved by the Court. *Louisville & N.R.R., supra*. 713 F.2d at 1248, 1249. There is no conflict among or between the circuits on the issue in question. Thus, the Court should deny the Railroad's Petition for a Writ of Certiorari.

## CONCLUSION

The Court of Appeals found the plain language of Section 402(d) of the BLBA clearly revealed a Congressional intent to bring a small group of railroad workers within the scope of the BLBA. Even if the legislative history is used for guidance, the Director's interpretation of Section 402(d), which includes coverage of railroad workers transporting raw coal from a coal mine site to a preparation facility, is a permissible construction of the Act which must be given effect under a Chevron analysis. Notwithstanding the Railroad's contention to the contrary

there exists no conflict among or between the Circuits on the issue involved in the case at bar. Furthermore, the decision by the Court of Appeals is a narrow holding and will impact on only a small group of railroad workers. Clearly, there are many railroad workers who have transported coal after the extraction and preparation processes have been completed and are exposed to a substantial amount of coal dust. Whether rightly or wrongly, these workers have been excluded from the protection of the Black Lung Benefits Act. Yet, there is a subclass of railroad workers who performed a substantial portion of their employment for the railroad transporting coal from a mine site directly to a preparation facility. Mr. Roberson falls within that subclass of railroad workers.

WHEREFORE, for the reasons expressed herein, the Respondent, Olen Roberson, by Counsel prays that the Honorable Supreme Court of the United States deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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# APPENDIX

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Opinion of the Court of Appeals in *Norfolk & Western Railway Company v. Olen Roberson and Director, Office of Workers' Compensation Programs, United States Department of Labor*, 918 F.2d 114 (4th Cir. 1990) 1a

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 89-2192

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NORFOLK & WESTERN RAILWAY COMPANY,

Petitioner,

versus

OLEN R. ROBERSON; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents

ASSOCIATION OF AMERICAN RAILROADS,

Amicus Curiae.

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On Petition for Review of an Order of the Benefits Review Board. (87-235-BLA)

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Argued: April 4, 1990
Decided: November 16, 1990

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Before WIDENER, PHILLIPS, and WILKINSON*, Circuit Judges

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* Judge Wilkinson was a member of the panel which heard oral argument in the case, but he later recused himself. The decision is filed by a quorum of the panel 28 U.S.C. 46(d).

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Affirmed by published opinion. Judge Widener wrote the opinion, in which Judge Phillips joined.

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ARGUED: William Beverly Poff, WOODS, ROGERS & HAZLEGROVE, Roanoke, Virginia, for Petitioner. Elizabeth Hopkins, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C.; Lawrence Lee Moise, III, VINYARD AND MOISE, P.C., Abingdon, Virginia, for Respondents. ON BRIEF: Clinton S. Morse, WOODS, ROGERS & HAZLEGROVE, Roanoke, Virginia; Douglas A. Smoot, JACKSON & KELLY, Charleston, West Virginia, for Petitioner. Robert P. Davis, Solicitor of Labor, Allen H. Feldman, Associate Solicitor for Special Appellate and Supreme Court Litigation, Steven J. Mandel, Counsel for Appellate Litigation, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C.; Robert Austin Vinyard, VINYARD AND MOISE, P.C., Abingdon, Virginia, for Respondents. J. Thomas Tidd, Daniel Saphire, ASSOCIATE OF AMERICAN RAILROADS, Washington, D.C.; Ralph J. Moore, Jr., John Townsend Rich, Alok Ahuja, SHEA & GARDNER, Washington, D.C., for Amicus Curiae.

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Widener, Circuit Judge:

Norfolk & Western Railway Company (N & W) petitions for review of a decision and order of the Benefits Review Board affirming an order of an Administrative Law Judge (ALJ) that awarded benefits under the Black Lung Benefits Act, 30 U.S.C. Sections 901, et seq. (Act), to Olen R. Roberson, a retired N & W employee. Both the ALJ and the Board concluded that N & W qualified as a coal mine operator under the Act and that Roberson qualified as a coal miner who was entitled to benefits. We affirm.

Olen R. Roberson worked as a brakeman and conductor for N & W from 1947 to 1979. The parties do not dispute that the initial and final periods of his employment, from 1947 to 1956 and from 1973 to his retirement in 1979, did not constitute coal mine employment. Between 1956 and 1973, however, Roberson worked on N & W runs that delivered empty railroad cars to mine sites to be loaded with raw coal and which then hauled the raw coal from the mines to a coal preparation plant where the coal was washed, cleaned, graded and reloaded for further shipment.

One of the principal crews with which Roberson worked made the "Carbo Run," which originated in Carbo, Virginia.1 This crew traveled from Carbo thirty miles to Richlands, Virginia, where it picked up empty coal cars and delivered them to a Jewel Ridge Coal Company mine located some six miles away. The crew then transported the raw coal back to Carbo to the Clinchfield Coal Company preparation plant, a distance of thirty-six miles. The entire run took twelve to fourteen hours to complete. Roberson's crew also transported raw coal to the Clinchfield preparation plant from mines in Duty, Virginia, an eight to ten mile run that could be accomplished two or three times in one day.

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1 The ALJ credited Roberson with 14 years of coal mine employment based on his testimony that he worked on the Carbo Run a total of 14 years.

judicial deference, if the Director urges us to adopt the Board's interpretation, our analysis is governed by *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Newport News Shipbuilding and Dry Dock Co. v. Howard*, 904 F.2d. 206, 208 (4th Cir. 1990).

Under *Chevron* we first must ask whether Congress directly has addressed the precise issue in dispute. *Chevron*, 467 U.S. at 842. If so, the court and the agency must give effect to unambiguous Congressional intent. *Chevron*, 467 U.S. at 842-43. If Congressional intent is unclear or ambiguous, however, we must determine only whether the Director's interpretation is based on a permissible construction of the Act; we may not substitute our own construction of the Act for a reasonable one made by the Director. *Chevron*, 467 U.S. at 844; *Howard*, 904 F.2d at 209.

Our starting point, of course, is the language of the Act, which defines a miner as

> any individual who works or has worked in or around a coal mine or a coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.

30 U.S.C. Section 902(d) (emphasis added). Thus, the plain language of the statute requires the inclusion in the definition of miner of transportation workers who were involved "in the extraction or preparation of coal," who worked "in or around a coal mine," and who were "exposed to coal dust as a result of such employment." Because N & W does not dispute Roberson's exposure to coal dust, we turn to the other two inquiries, which often are described as the requirements of situs and function. *Eplion*, 794 F.2d at 937.

Roberson's duties included coupling and uncoupling high pressure air hoses between the cars, which blew coal dust into the air, setting and releasing brakes, and obtaining loading numbers and tags from the individual cars. Because most of Roberson's tasks were performed while the train was stationary, Roberson spent a significant portion of his workday at the mine sites and the preparation plant. At times, Roberson "walked" a hundred cars at a time. In addition, coal dust also blew off the tops of the loaded railroad cars during the trips between the mines and the preparation plant. Thus, although Roberson never participated in the actual loading or unloading of coal, he was continually exposed to large amounts of coal dust. Roberson applied for black lung benefits in 1978, one year before his retirement.

The ALJ determined that N & W's coal hauling activities qualified it as the responsible operator under the Act and that Roberson qualified as a miner who was entitled to benefits. Finally, the ALJ concluded pursuant to the interim presumption in 20 C.F.R. Section 727.203(a) that Roberson is totally disabled from pneumoconiosis due to coal mine employment, and that N & W failed to rebut the presumption.2 The Board found that each of the ALJ's conclusions was supported by substantial evidence. See 33 U.S.C. Section 921(b)(3).

Our review of the Board's order is governed by section 21 of the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. Section 921. 30 U.S.C. Section 932(a). Specifically, we must uphold the Board's resolution of questions of statutory construction or application of the Act to a specific set of facts if it is supported by a reasonable factual and legal basis. *Eplion v. Director, OWCP*, 794 F.2d 935, 936 (4th Cir. 1986). In addition, the Director urges us to adopt the Board's interpretation of the Act. Although the Board's interpretation standing alone is not entitled to special

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2 N & W does not challenge on review the findings of the ALJ and Board on this issue, so the Board's finding of disability stands as ordered.

In affirming an order of the Board denying black lung benefits to a claimant whose job entailed knocking open doors to railroad cars so that coal could be loaded into barges, we emphasized that "[claimant] was not involved in transporting the coal before it was prepared. The coal was already processed and prepared for market before [claimant] had any contact with it." Eplion, 794 F.2d at 937. We concluded in Eplion, therefore, that the claimant failed to qualify as a miner under the Act because he did not meet the situs and function tests set forth in the statute.

In contrast to *Eplion*, the ALJ's undisputed findings of fact in this case are that Roberson was involved in hauling raw coal from extraction sites (mines) to the preparation plant, which also is considered a coal mine under the Act. See 30 U.S.C. Section 802(h)(2). Transporting raw coal to a preparation plant plainly is part of the preparation of coal, and Roberson therefore satisfies the function test. In addition, the ALJ specifically found that because Roberson did a lot of his work while the train was parked at the mine sites and the preparation plant, Roberson spent "a significant portion of time" in or around a coal mine, as defined by the statute. Therefore, Roberson also satisfies the situs test.

Except for the mode of transportation involved, and perhaps the distance traveled, this case is indistinguishable from *Roberts v. Weinberger*, 527 F.2d 600 (4th Cir. 1975). In *Roberts* we determined, three years before the 1978 amendment to the statute expressly included transportation workers in the definition of miner, that a truck driver who hauled coal between a strip mine and the tipple qualified as a miner entitled to benefits under the Act. Just as Roberson did in the case at hand, the truck driver in *Roberts* hauled coal from the extraction site to the tipple, where it was processed, graded, and reloaded for further shipment. *Roberts*, 527 F.2d at 601. We reasoned that the driver's functions

> were part of the process of "extracting the coal and preparing the coal so extracted." The coal was not extracted and prepared

> until it was taken from the mine to the place where it was processed and graded so as to be in condition for delivery to distributors and consumers.

*Roberts*, 527 F. 2d at 602. Because we concluded in *Roberts* that the Act "is unambiguous in extending coverage" to the truck driver, *Roberts*, 527 F.2d at 602, we have little difficulty in concluding that the plain language of the Act, especially when reinforced by the 1978 amendment, manifests a clear Congressional intent to include in the definition of miner a small group of transportation workers of which Roberson was a member.

N & W advances several arguments in an attempt to distinguish *Roberts* and establish that railroad employees are fundamentally different from other transportation workers. First, it relies extensively on the legislative history to the 1978 amendments to the Act. Because we conclude that the plain language of the Act supports the Board's decision, however, we "must give effect to the unambiguously expressed intent of Congress," *Chevron*, 467 U.S. at 843, and we have no need to resort to the Act's legislative history.3

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3 Even if we found the language of the Act unclear and resorted to the legislative history, our result would be no different. N & W relies on Senate Report No. 209 95th Cong., 1st Sess. 21 (1977), which states concerning the definition of miner that "[t]he provision does not contemplate inclusion of those workers employed by a railroad, trucking company, or barge line unless such company also operates a mine." The floor manager of the Senate bill, Senator Randolph, made a similar statement during floor debate. The Senate bill, however, did not prevail, and the subsequent Conference Committee Report contains no language excluding railroad workers or any other specific set of transportation workers from the definition of miner; indeed, the Conference Report sticks closely to the literal language of the statute, as have we. H. Conf. Rep. No. 864, 95th Cong., 2d Sess., reprinted in 2 U.S. Code Cong. & Admin. News 308-09(1978). Because the Conference Report "represents the final statement of terms agreed upon by both houses of Congress, next to the statute itself, it is the most persuasive evidence of congressional intent behind the enactment

Second, N & W argues that allowing a railroad employee to recover under the Act would be inconsistent with other federal legislation that already protects railroad employees from disability or injury, such as the Federal Employers' Liability Act, 45 U.S.C. Section 51 et seq., the Railroad Retirement Act, 45 U.S.C. Sections 231 et seq.4 and the Railroad Unemployment Insurance Act 45 U.S.C. Sections 351. et seq. We dissagree. Not only do the statutes differ in certain material respects (the FELA, for example, requires employer negligence, 45 U.S.C. Section 51, while the Black Lung Act does not), none of the other statutes indicate that Congress intended them to preclude the availability of other federal remedial legislation. Instead, the FELA, upon which N & W principally relies, does just the opposite. See 45 U.S.C. Section 58 ("Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress."). So that argument is, we think, without merit.

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of a statute." Davis v. Lukhard, 788 F.2d 973, 981 (4th Cir.), cert. denied, 479 U.S. 868 (1986). Thus, even if we looked to the legislative history for guidance, the Director's interpretation of the Act still would be a permissible one that we should not set aside. Chevron, 467 U.S. at 843-44. N & W's reliance on Fox v. Director, OWCP, 889 F.2d 1037 (11th Cir. 1989), which cited the Senate Report in the course of determining that a coke oven worker was not a miner, is unpersuasive. The Fox court did not explain why it resorted to the legislative history of a version of a bill that was not adopted, quite possibly because the passage was not essential to the court's holding. In light of the fact that a coke oven is a consumer of coal, the Fox court understandably found that the coke oven worker was not involved in the preparation of coal under the Act. Fox, 889 F.2d at 1042-43. ("[T]he processing and use of the minerals by subsequent consumers is not a part of that process." 889 F.2d. at 1040)

4 N & W has moved to supplement the appellate record in this case to include a letter indicating that Roberson was granted an annuity pursuant to the Railroad Retirement Act based on occupational disability. Although we grant N & W's motion to supplement the record, the letter does not change our analysis for the reasons indicated in the text.

N & W also contends that, as an industry exclusively regulated by the Interstate Commerce Commission (ICC), railroads are uniquely different from other carriers because all their services are considered to be part of interstate commerce. We know of no part of the Act, the regulations, or any reported case interpreting the Act or regulations, however, that distinguishes a common carrier or transportation worker on the basis of connections with interstate commerce. Indeed, in *Roberts* we found that the truck driver qualified as a miner despite conflicting evidence as to whether he was employed by the coal company or a trucking subcontractor. *Roberts*, 527 F.2d at 602. The Fifth Circuit recognized, in *Freeman v. Califano*, 600 F.2d 1057, 1060 & n.2 (5th Cir. 1979), that *Roberts* implicitly rejected an argument that the nature of the employer could make for differing results ("The Fourth Circuit evidently deemed this question unimportant . . . . "), and went on to hold that "nothing in [the Act] or the regulations indicates that application of the presumption should turn on the nature of the employer's business rather than the nature and location of the work done." Also, we do not think that the result in *Roberts* would have been different had a state line lain between the mine and the tipple, and we reject N & W's argument.

Within N & W's many references to the ICC and the federal regulatory statutes, however, is a simpler and somewhat more persuasive argument. In the midst of its recitation of statutes and regulations, N & W also argues that the interstate commerce aspects of its business, and the fact that the Carbo Run covered thirty-six miles, take Roberson's employment out of the statutory definition of employment "in or around a coal mine" and "in the extraction or preparation of coal." As we noted earlier, however, the ALJ found, and N & W does not dispute, that Roberson spent a significant portion of his workday actually at the mines and preparation plant, and that Roberson was engaged in hauling raw coal between two statutory "mines." Thus, N & W's argument, though undoubtedly valid with respect to many of its employees who haul coal, is without merit as to this particular claimant.

Even if Roberson meets the statutory definition of miner, N & W also asserts that it cannot be an operator under the Act. The relevant statute defines operator as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." 30 U.S.C. Section 802(d) (emphasis added). In addition, the applicable regulations provide that "any employer of a miner as defined in Section 727.202(a) shall, to the extent appropriate, be considered an operator for the purposes of this part . . . ." 20 C.F.R. Section 725.491(a). Because we have concluded that Roberson meets the statutory definition of miner, the regulation defines N & W as an operator if "appropriate."

In *Old Dominion Power Co. v. Donovan*, 772 F.2d 92, 96 (4th Cir. 1985), we concluded that Congress intended to include within the definition of operator only those independent contractors who maintain a continuing presence at a mine. Because Old Dominion's employees normally were present at the mine site only once a month to read the meter, we concluded that Old Dominion was not an operator under the statute. By contrast, the ALJ found here that N & W maintained a continuing presence at the mine site and performed services essential to the preparation of the coal. We conclude that N & W appropriately was considered the responsible operator under the Act.5

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5 N & W argues that classifying it as an operator would place the railroad in violation of federal law because railroads are prohibited from transporting commodities that are "manufactured, mined, or produced by the carrier or under its authority." 49 U.S.C. Section 10746. However, neither Roberson nor the Director ever has asserted that N & W actually mined or supervised the mining of coal, and considering N & W an operator under the plain language of the Act does not alter what the parties do not dispute. The fact that an employer may be a statutory operator under 30 U.S.C. Section 802(d) and 20 C.F.R Section 725.491(a) does not mean that the coal involved was "manufactured, mined or produced" by the employer within the meaning of 49 U.S.C. Section 10746.

In conclusion, our holding is necessarily narrow. In the ordinary case a railroad employee engaged in the transportation of coal may well not qualify for benefits under the Act. The demanding tests of function and situs must be met, as they were in this case. After the coal is prepared and reloaded for shipment, a railroad employee would not satisfy the function test. And the possibility of satisfying the situs requirement diminishes as the distance traveled on the rails increases, rendering the employment other than "in or around a coal mine." If a claimant fulfills all the statutory requirements, however, as Roberson has here, we decline to hold that his status as a railroad employee negates his recovery of benefits under the Act to which he otherwise would be entitled.

The order of the Board which has been reviewed is

AFFIRMED